

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

SAFECO INSURANCE COMPANY OF :
AMERICA : CIVIL ACTION No. 02-CV-2899 (BWK)
:
v. :
:
DEMATOS ENTERPRISES, INC., et al. :

DEFENDANTS' PRETRIAL MEMORANDUM

**I. BRIEF STATEMENT OF THE NATURE OF THE ACTION
ON THE BASIS OF FEDERAL COURT JURISDICTION**

This matter involves claims by a surety company, which has allegedly paid claims under surety and performance bonds it issued, against the alleged guarantors of those bonds. The case arises out of the failure of DeMatos Enterprises, Inc., a corporation which was involved in the business of construction of public water treatment plants. As a result of the cessation of business, Plaintiff claims it is entitled to reimbursement for and claims it has paid and expenses it has incurred.

Jurisdiction is founded on 28 U.S.C. §1332, based upon the diversity of the citizenship of the parties and the amount alleged to be in controversy.

II. BRIEF STATEMENT OF THE FACTS OF THE CASE

DeMatos Enterprises, Inc. ceased operations and filed a petition under Chapter 7 of the Bankruptcy Code on or about February 19, 2002. As a result of the bankruptcy, and because of the default on the part of DeMatos Enterprises, Inc. with respect to certain construction projects in which the company had been engaged, Safeco, which had issued certain payment and performance bonds on behalf of DeMatos Enterprises, Inc., has paid claims and incurred expenses, for which it contends the individual indemnitor defendants are liable under a certain

indemnity agreement. The individual indemnitor defendants do not dispute that they signed the document entitled General Agreement of Indemnity on or about December 9, 1998 (“Indemnity Agreement”), which is attached as Exhibit A to the Complaint.

Safeco’s claims in this litigation can be summarized as a fairly straight forward breach of contract claim under the Indemnity Agreement, coupled with two fraudulent transfer claims asserted under the Pennsylvania Uniform Fraudulent Transfer Act. The fraudulent transfer claims relate to Defendant Maria DeMatos’ transfer of her real estate to her daughter and son-in-law. It is alleged that the transaction was either actually or constructively fraudulent as to Safeco. Defendants deny liability. The transfer was neither constructively nor actually fraudulent.

Safeco contends that it has expended \$740,069.73 on payment bond and performance bond claims. Safeco also asserts that it has incurred attorneys’ fees and costs, investigative costs and consulting fees totaling \$147,051.50, and estimates that it will incur additional losses and expenses of approximately \$100,000. Finally, Safeco contends that it is entitled to interest at the rate of 6% per annum on payments it has made, which interest it contends totals \$12,298.53 as of November 20, 2002, which accrues thereafter at the rate of \$145.83 per day.

At the same time, Safeco concedes that it may collect accounts receivable with respect to DeMatos Enterprises, Inc. projects. Safeco “estimates” the maximum possible recovery to be \$396,299.06.

Safeco has yet to account for the accounts receivable or provide Defendants with a final statement of its claims. Upon information and belief, Safeco is still in the process of finishing projects and collecting accounts receivable.

III. LIST OF MONETARY DAMAGES CLAIMED

Defendants incorporate the claims of Plaintiff as set forth in the Pretrial Memorandum Submitted on Behalf of Plaintiff, Safeco Insurance Company of America, without admitting the accuracy thereof.

IV. NAMES AND ADDRESSES OF WITNESSES

Defendants intend to call at trial:

Joachim DeMatos
2287 Black River Road
Bethlehem, PA 18015

Steve Ferretti
Cashin Spinelli Heller & Ferretti, LLC
4170 Veterans Memorial Highway
Bohemia, NY 11716

Donna DeMatos
2287 Black River Road
Bethlehem, PA 18015

Maria DeMatos
2291 Black River Road
Bethlehem, PA 18015

Elizabeth DeMatos Grys
2291 Black River Road
Bethlehem, PA 18105

Christopher Grys
2291 Black River Road
Bethlehem, PA 18015

John T. Durkin
263 South York Road
Hatboro, PA 19040

Christopher P. Cashin
Cashin Spinelli Heller & Ferretti, LLC
4170 Veterans Memorial Highway
Bohemia, NY 11716

Emil Giordano, Esquire
107 North Commerce Way
Suite 120
Bethlehem, PA 18017

Scott C. Butler, CFP
Certified Financial Planner
539 South Main Street
Nazareth, PA 18064

James Martin Connell, Esquire
251 East Broad Street
Bethlehem, PA 18018

Kevin K. Kercher, Esquire
881 Third Street
Suite C-2
Whitehall, PA 18052

Ronald Langlois, Vice President
Suburban Community Bank
40 East Road
Feasterville, PA 19053

Tatiana Loyhn
2293 Black River Road
Bethlehem, PA 18015

Joseph A. Armstrong
Kathleen A. Armstrong
2297 Black River Road
Bethlehem, PA 18015

Ira Sussman, Safeco Claims Representative
Safeco Insurance Company of America
Safeco Plaza
Seattle, WA 98185

Defendants reserve the right to call any witnesses identified by Plaintiff.

V. SCHEDULE OF EXHIBITS

Defendants reserve the right to utilize all exhibits identified by Plaintiff. In addition Defendants identify the following:

- 1) Letter from James Martin Connell, Esquire to Maria DeMatos dated October 2, 2000;
- 2) Agreement and Release by and among Suburban Community Bank, DeMatos Enterprises, Inc., Maria L. DeMatos, Joaquim DeMatos and Donna M. DeMatos dated July 30, 2002;
- 3) Closing documents regarding sale of 2297 Black River Road, Bethlehem, Pennsylvania;
- 4) Closing documents regarding sale of 2293 Black River Road, Bethlehem, Pennsylvania;
- 5) Confession of Judgment in No. C-48-CV-2002-1994, Suburban Community Bank v. Maria L. DeMatos;
- 6) Confession of Judgment in No. C-48-CV-2002-1995, Suburban Community Bank v. Joaquim and Donna DeMatos;

Defendants reserve the right to use additional documents for rebuttal.

VI. ESTIMATED DAYS REQUIRED FOR TRIAL

Defendants estimate the trial will take 2 to 3 days.

VII. SPECIAL COMMENTS

Defendants believe this matter should be scheduled for a settlement conference with a Magistrate Judge.

FITZPATRICK LENTZ & BUBBA, P.C.

Date: April 2, 2003

By: _____/S/
Douglas J. Smillie
4001 Schoolhouse Lane
P.O. Box 219
Center Valley, PA 18034-0219
(610) 797-9000
Attorney for Defendants

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CERTIFICATE OF SERVICE

I, DOUGLAS J. SMILLIE, hereby certify that a true and correct copy of the Defendants' Pretrial Memorandum has been filed electronically and is available for viewing and downloading from the ECF System. In addition, a true and correct copy was served upon counsel for Plaintiff at the following address, by regular U.S. Mail, postage prepaid, upon the following:

Kevin T. Fogerty, Esquire
Mill Run Office Center
1275 Glenlivet Drive
Suite 150
Allentown, PA 18106

FITZPATRICK LENTZ & BUBBA, P.C.

Dated: April 2, 2003

By: _____/S/
Douglas J. Smillie
4001 Schoolhouse Lane
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